IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 9847 of 2005

For Approval and Signature:

HON'BLE MR JUSTICE AKIL KURESHI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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KISHANSINH TOMAR CHAIRMAN,STANDING COMMITTEE - Petitioner(s)

Versus

MUNICIPAL CORPORATION OF AHMEDABAD CITY & 2 - Respondent(s)

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Appearance :
Mr Y.N.OZA, SENIOR ADVOCATE WITH

MR.RS SANJANWALA for Petitioner No(s).: 1.
M/S TRIVEDI & GUPTA for Respondent No(s).: 1.
MR.P.R.ABICHANDANI, A.G.P. for Respondent No(s).: 2.
MR.S.N.SHELAT, ADVOCATE GENERAL WITH

MR NV ANJARIA for Respondent No(s).: 3.

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CORAM :HON'BLE MR JUSTICE AKIL KURESHI

Date : 23/06/2005

ORAL JUDGMENT

1.Considering the urgency involved in the matter and considering the important issues involved, this petition was taken up by the consent of learned

Advocates appearing for all parties for final disposal at admission stage.

2. In the present petition, the petitioner has prayed for a direction, directing the respondents to take all urgent steps necessary for the purpose of holding election to constitute the Municipal Corporation in the City of Ahmedabad before the expiry of its term.

3. The petitioner who is the Chairman of the Standing Committee of Ahmedabad Municipal Corporation, has approached this Court, by filing this petition apprehending that the respondents are not likely to conduct the election for constitution of a newly elected body of Ahmedabad Municipal Corporation, before the term of the existing Councillers would expire. It is the case of the petitioner and about which there is no dispute that the Ahmedabad Municipal Corporation was constituted on 16th of October, 2000, pursuant to the election of its councillers held in the year 2000 under the Provisions of Article 243 U of the Constitution of India and under the Provisions of Bombay Provincial Municipal Corporation Act (Hereinafter to be referred to as the B.P.M.C. Act). Accordingly, upon completion of a term of five years, the term of the office of the present elected councillers would come to an end on 15th of October, 2005.

It is the case of the petitioner that as per the Provisions of Article 243 U of the Constitution, as well as, Section 6B of the B.P.M.C. Act, there is a clear mandate that an election to constitute the Municipal Corporation has to be completed before the expiry of its duration of five years. It is therefore, the case of the petitioner that all formalities for holding the election and for its

completion should be concluded before 15th of October, 2005 so that, newly elected body can be installed and can take charge of the Corporation in place of the existing body of the councillers.

The petitioner has stated in the petition that as per the Provisions of Article 243UA of the Constitution of India read with Section 14 of the B.P.M.C. Act, superintendence directions and control for the preparation of all electoral rolls for and conduct of all the elections of the Corporation vest in the State Election Commission (Hereinafter to be referred to as the Commission).

The petitioner has stated in the petition that as the five year term of the Ahmedabad Municipal Corporation is to expire on 15th of October, 2005, the petitioner has in his capacity as Chairman of the Standing Committee of the Corporation addressed a letter to the Commission on 12th of April, 2004. In the said letter, the petitioner had requested the Commission to hold the elections of the Ahmedabad Municipal Corporation, so as to constitute a new body of councillers before the 15th of October, 2005.

On 21/4/2005 the Standing Committee of the Ahmedabad Municipal Corporation passed a resolution resolving to make a representation to the Commission and to the State Government for issuance of a necessary notification for reconstitution of the wards and for allotment of reserved seats. A copy of the said resolution was forwarded to the Commission on 21/4/2005. This resolution was also brought to the notice of the State Government by a letter dated

29/4/2005.

Since, there was no response to the various letters written by the petitioner and the resolution of the standing committee and since, no steps were taken by the respondents for conducting the election before the expiry of the term of the Ahmedabad Municipal Corporation, the petitioner apprehended that unless immediate steps are taken by the Commission, it would be impossible to constitute the Corporation before the term of the existing councillers come to an end.

The petitioner has further stated in his petition that the State Government is interested in postponing the election for the Municipal Corporation of Ahmedabad so that an administrator can be appointed by the State Government and the control of the Corporation can be taken over by the Government. It is stated that the majority of the councillers of the Corporation belong to the Congress Party and if elections are held as per the requirement of the Constitution and B.P.M.C. Act, Congress party is likely to get majority. The State Government however does not want to hold the election and is interested in appointment of an administrator. It is therefore, contended that the action of the Government is politically motivated and mala-fide.

On the basis of this factual averments the petitioner has filed the present petition and as noted above has prayed for a direction to the respondents to take all steps forthwith for the purpose of holding the election for constituting Municipal Corporation in the City of Ahmedabad before the expiry of the duration of the present Corporation.

4.An affidavit in reply has been filed on behalf of respondent no.1 i.e. Ahmedabad Municipal Corporation. Main averment made in the affidavit in reply dated 14th of June, 2005 filed on behalf of the respondent no.1 is that the respondent no.1 is not responsible for holding election and no relief against the respondent no.1 therefore, should be granted.

5.An affidavit in reply dated 17th of June, 2005 has been filed on behalf of the respondent no.3 i.e. State Election Commission. In the affidavit in reply, it is stated interalia that under the Provisions of Section 5 of B.P.M.C. Act, the State Government has issued notification dated 8th of June, 2005 determining wards for the city of Ahmedabad by which the total number of wards came to be increased from 43 to 45 and also, determining the number of reserved seats for the persons belonging to reserved categories and women. It is further stated that in view of the said notification issued by the State Government, the Commission is required to proceeded to delimit the wards of the City of Ahmedabad in accordance with the statutory rules viz. Bombay Provincial Municipal Corporation (Delimitation of Wards in the City and Allocation of Reserved Seats) Rules, 1994. (These rules shall be referred to hereinafter as the Delimitation of Wards Rules, 1994.)

It is stated that upon receipt of the notification from the State Government on 9th of June, 2005, immediately on the same day, the Commission issued a circular requiring Collectors and Designated Officers to furnish details and to make proposals for delimitation of the wards. On 21st of June, 2005 the Commission has convened the meeting with the

Collectors and Election Officers for further progress.

It is stated that estimated time that will be taken for the process of delimitation is two months. Thereafter, the next stage will be that of preparation of voters list in each ward, in accordance with the Bombay Provincial Municipal Corporation (Registration of Voters) Rules, 1994.(hereinafter to be referred to as the Registration of Voters Rules, 1994). The respondent no.3 has produced at Annexure – 3 with the said affidavit in reply, a table showing the time period which will be required for completing the election passing through different phases of holding of the election beginning with delimitation of wards and completing with the holding of election. It is stated that, considering the various stages, which will be required to be undertaken by the Commission including the consultation with recognized political parties, in connection with delimitation of wards; it is the assessment of the Commission that it will require a total period of over six months for completing the election given other circumstances being normal. It is stated that the Commission could act only after the State Government issued the notification dated 8/6/2005 and the Commission would strive to complete the election as expeditiously as possible. It is stated that the Commission will ensure that no avoidable delay takes place in constituting the new body of elected councillers.

6. Considering the urgency involved in the matter, learned A.G.P. Shri P.R.Abichandani, instead of taking time for an elaborate reply on behalf of the State Government, produced on record a table showing the

detailed steps taken by the State Government at various stages culminating into issuance of the notification dated 8th of June, 2005. He also made available original files pertaining to this issue for the perusal of the Court. Learned Counsel Shri Y.N.Oza appearing for the petitioner submitted that he has no objection if the Court peruses the files of the State – Government.

In the chart produced on behalf of the State Government, it is indicated that on 19/8/2002, the delimitation commission informed the State Government that there is a ban on changing or alteration of boundaries of administrative unit of circles involved. On 4/3/2004 the Government called for required information from all Municipal Corporations for determining the number of wards, councillers and their reserved seats on the basis of cencus of 2001. On 20th of March, 2004, all six Municipal Corporations were asked to submit detailed proposals regarding the number of wards, councillers and reserved seats as per the cencus of 2001. It is stated that final figures of cencus – 2001 were received from the Director of cencus on 16/4/2004. On 17/6/2004 all these Municipal Corporations of the State of Gujarat were requested to send proposal for number of wards, etc... as per the final cencus figures of 2001. Between 19/7/2004 to 4/12/2004, such proposals were received from different Municipal Corporations. It is noteworthy that the proposal was received from Ahmedabad Municipal Corporation only on 4/12/2004. On 18/12/2004 Delimitation Commission was requested to relax the ban on alteration of boundaries. On 3/1/2005, 15/1/2005 and on 23/2/2005 the Delimitation Commission was reminded to grant such permission. Permission was received from the Delimitation

Commission granted vide its letter dated 24/3/2005. On 15/4/2005 proposal was submitted for the approval of the Government for fixation of number of wards, councillers and for seats to be reserved for reserved categories and in favour of women. On 6/6/2005 the proposal was scrutinized by the State Government and approved. Draft notification was also sent on the same day which was vetted by the concerned department on 7th of June, 2005 and on 8th of June, 2005, the notification was issued by the State Government in exercise of powers under Section 5 of the B.P.M.C. Act.

7. On the basis of above factual material, learned Advocate appearing for the respective parties have made detailed submissions on the issues arising in the present petition. Before recording and dealing with rival submissions, it would be useful to take note of some of the provisions contained in the Constitution of India and the B.P.M.C. Act concerning the election of the Municipal Corporations. Article 243 U of the Constitution provides interalia for duration of municipalities. Clause – (1) of article 243 U provides that every municipality unless sooner desolved under any law for the time being in force, shall continue for five years from the date appointed for its first meeting and no longer. Clause – (3) of article 243 U provides that the election to constitute the Municipality shall be completed before the expiry of its duration specified in Clause – (1) or before the expiration of a period of six months from the date of its dissolution. Article 243 U of the Constitution reads as under.

"243U Duration of Municipalities, etc:- (1) Every Municipality, unless sooner dissolved under any law for

the time being in force, shall continue for five years from the date appointed for its first meeting and not no longer:

Provided that a Municipality shall be given a reasonable opportunity of being heard before its desollution.

(2) No amendment of any law for the time being in force shall have the effect of causing dissolution of a Municipality at any level, which i functioning immediately before such amendment, till the expiration of its duration specified in clause (1):

(3) An election to constitute a Municipality shall be completed,-

(a) before the expiry of its duration specified in clause (1),

(b) before the expiration of a period of six months from the date of its dissolution:

Provided that where the remainder of the period for which the dissolved Municipality would have continued is less than six months, it shall not be necessary to hold any election under this clause for constituting the Municipality for such period.

(4)A Municipality constituted upon the dissolution of a Municipality before the expiration of its duration shall continue only for the remainder of the period for which the dissolved Municipality would have continued under clause (1) had it not bee so dissolved."

Article **243ZA** of the Constitution of India provides that the superintendence, direction and control of the preparation of electoral rolls for and the conduct of all elections to the Municipalities shall be vested in the State Election Commission and subject to the provisions of the Constitution, the legislature of a State may by law, make provision with respect to all matters relating to or in connection with the elections to the municipalities. Article 243ZA of the Constitution reads as follows.

“243ZA. Elections to the Municipalities.- (1) The superintendence, direction and control of the preparation of electoral rolls for, and the conduct of, all elections to the Municipalities shall be vested in the State Election Commission referred to in Art.243K.

(2) Subject to the provisions of this Constitution, the Legislature of a State may, by law, make provision with respect to all matters relating to, or in connection with elections to the Municipalities.”

Article 243ZF of the Constitution of India provides interalia that notwithstanding anything contained in this part i.e. Part IXA of the Constitution, any Provision of Law relating to Municipalities in force in a State immediately before the commencement of the Constitution (74th Amendment) 1992, which is inconsistent with the provisions of this part shall continue to be in force until amended or repealed by competent legislature or other competent authority or until the expiration of one year from such commencement which ever is earlier. Article 243ZF of the Constitution is as follows.

“243ZF. Continuance of existing laws and Municipalities.- Notwithstanding anything in this Party, any provision of

any law relating to Municipalities in force in a State immediately before the commencement of the Constitution (Seventy-fourth Amendment) Act, 1992, which is inconsistent with the provisions of this Part, shall continue to be in force until amended or repealed by a competent Legislature or other competent authority or until the expiration of one year from such commencement, whichever is earlier.

Provided that all the Municipalities existing immediately before such commencement shall continue till the expiration of their duration, unless sooner dissolved by a resolution passed to that effect by the Legislative Assembly of that State or, in the case of a State having a Legislative Council, by each House of the Legislature of that State."

Section 5 of the B.P.M.C. Act pertains to Constitution of the Corporation. Sub-section (1) of Section 5 of the B.P.M.C. Act provides that every corporation shall be a body corporate having perpetual succession and a common seal. Sub-section (2) of Section 5 of the B.P.M.C. Act provides that each corporation shall consist of councillers chosen by direct election. Sub-section (3) of Section 5 provides that the State Government by notification in the official gazette shall determine the number of wards into which the city shall be divided, the number of councillers to be elected to the corporation and the number of seats to be reserved in favour of the scheduled caste, schedule tribe, the backward class and women as provided in the Section. It also provides that upon issuance of such a notification, the commission shall carry out the determination of the

boundaries of the wards and the allocation of seats reserved in favour of the scheduled caste, scheduled tribe, backward class and women among the wards in prescribed manner. Sub-section (3) of Section 5 reads as follows.

"Where general election is to be held immediately after,

i. "**a larger urban area"** as specified under clause (2) of the article 243 Q of the Constitution of India, is made or

ii. the cencus is taken under the cencus Act (37 of 1949) 1948 and the relevant figures of which have been published, or

iii. the limits of a city are altered,-

(a) the State Government shall, by notification in the official Gazette, determine the number of wards into which the city shall be divided, the number of councillers to be elected to the Corporation and the number of seats to be reserved in favour of the scheduled castes; the scheduled Tribes, the backward classes and women as provided in this section, and

(b) the State Election Commission thereafter shall carry out the determination of the boundaries of the wards and the allocation of seats reserved in favour of the scheduled castes, scheduled tribes, the backward classes and women among the wards in the prescribed manner."

Sub-section (4) of Section 5 of the B.P.M.C. Act requires the State Government to reserve seats in favour of the schedule caste, schedule tribe in every corporation. Sub-section (4) of Section 5 reads as follows.

"Seats shall be reserved by the State Government for the scheduled castes and the Scheduled Tribes in every Corporation and the number of seats so reserved shall bear, as nearly as may be, the same proportion to the total number of seats to be filled by direct election in the Corporation as the population of the scheduled castes and scheduled Tribes in city bears to the total population of the city and such seats maybe allotted by rotation to different wards in the City in the prescribed manner."

Sub-section (5) of Section 5 provides for reservation of seats in favour of the women candidates. The said sub-section reads as follows:-

"One-third of the total number of seats reserved under sub-section (4) shall be reserved by the State Government for women belonging to the scheduled castes or, as the case may be, the Scheduled Tribes."

Sub-section (6) of Section 5 provides for reservation in favour of the backward class and reads as follows:-

" One-tenth of the total number of seats to be filed by direct election in every corporation shall be reserved for persons belonging to backward classes and one third of the seats so reserve for backward classes shall be reserved for women belonging to the backward classes."

Sub-section (7) of Section 5 provides for reservation for women within the reserved seats for

schedule caste, schedule tribe and for backward class. Sub-section (7) of section 5 reads as follow:

"One-third including the number of seats reserved for women belonging to the scheduled caste, the scheduled Tribes and the backward classes) of the total number of the seats to be filled by direct Election in the Corporation shall be reserves for women and such, seats may be allotted by rotation to different wards in the city in the prescribed manner."

Section 6 of B.P.M.C., Act interalia provides that every corporation unless sooner dissolved shall continue for five years form the date appointed for its first meeting and no longer. Section 6 of B.P.M.C. Act reads as follows.

" 6(1) Every Corporation unless sooner dissolved, shall continue for five years from the date appointed for its first meeting and no longer.

(2) A Corporation Constituted upon the dissolution before the expiration of its duration shall continue only for the remainder of the period for which it would have continued under Sub-section (1) had it not been so dissolved."

Section 6A of the B.P.M.C. Act provides that the term of the office of the councillers shall be co-extensive with the duration of the corporation. Section 6 (A) reads as follows.

" Section 6A The term of the office of the Councillors shall be co-extensive with the duration of the corporation."

Section 6B of the B.P.M.C. Act provides interalia

that an election to constitute a corporation shall be completed before the expiration of its duration specified in sub-section 1 of Section 6 or before the expiration of six months from the date of its dissolution. Section 6B reads as follows.

"6B An election to constitute a corporation shall be completed-

(a)before the expiration of its duration specified in sub-section (1) of the section 6;

(b) before the expiration of six months from the date of its dissolution: provided that where the remainder of the period for which the dissolved Corporation would have continued is less than six months, it shall not be necessary to hold any election under this section fro constituting the Corporation for such period;"

Section 6C of B.P.M.C. Act provides for transitor period with which we are not directly concerned.

Section 7A makes provision for appointment of an administrator after expiry of normal term of the office of councillers. Sub-section (1) of Section 7A reads as follows:-

"7A[1] Where,

(i) the duration of a Corporation has already expired or is due to expire during the transitory period as referred to in sub-section (1) of section 6C and election to constitute the Corporation not be Completed before the expiry of its duration, or

(ii)due to unforseem circumstances such as natural calamity riots, Communal disturbance the election to constitute Corporation could not be completed

before the expiry of its duration,

the State Government may be order published in the *official Gazette* appoint a person as an Administrator to manage the affairs of the Corporation during the period from the date specified in the order upto the date immediately preceding the date of the first meeting, after general election]"

It may be noted that the above noted provisions contained in B.P.M.C. Act were introduced pursuant to an Amendment Act i.e. Gujarat Act No.16 of 1993 to bring the provisions of the B.P.M.C. Act pertaining to election of the councillers and constitution of the Corporation in tune with the provisions of the Constitution of India introduced in Article 243 U introduced by Constitution (73rd Amendment) Act, 1992.

8. In the above factual background and statutory provisions, it is contended on behalf of the petitioner by learned Senior Counsel Shri Oza that, it is bounden duty of the Commission to hold and complete the election for the councillers of a Corporation well before the term of the Corporation expires. He contends that it is the Constitutional mandate on the Commission to conclude the election so that duly elected body of councillers can take over the charge on completion of the term of the outgoing body of councillers in a Corporation. Pointing out the Provisions of Article 243 U of the Constitution of India, as well as, Section 6 and 7A of the B.P.M.C. Act, he contends that the Commission has an obligation to conduct and finally conclude the elections so that there is no gap between the outgoing body of councillers and

the installation of newly elected councillers in powers.

It is contended that it is the election commission alone which has the power and authority to initiate the election process and to complete the same and the State Government or any other body cannot create any hindrance in smooth conduct of the elections. It is his contention that, in no manner directly or indirectly, the State Government can delay the election process beyond the term of the existing Corporation and it is the Election Commission alone which can set the entire schedule in such a manner that the elections are completed well before the time.

It is further contended on behalf of the petitioner that the State Government is interested in delaying the election process to ensure that upon completion of the term of the existing corporation instead of an elected body of councillers, the Corporation is managed by an administrator appointed by the Government. It is his contention that to fulfill this aim, the State Government has delayed the election process and has thereby acted with political malafides.

With respect to the time frame suggested by the Commission, learned Counsel submitted that the time suggested is not reasonable and the same can be compressed to a considerable degree and even now, it is possible for the Commission to conclude the election before the impeding deadline of 15th of October, 2005.

It is further contended that, the Commission should not wait for the State Government to issue the

notification in exercise of powers under Section 5 of the B.P.M.C. Act and even in absence of any such notification, it was open for the election commission to initiate the process of conduct of election. It is submitted that, if the State Government for some reason does not issue such a notification, the Commission is neither powerless nor can it disregard its duties to hold the elections within the time frame envisaged under the Law.

9. Learned Counsel for the petitioner relied on the decision of the Division Bench of this High Court in the case of A.A.Kureshi Vs. State Government reported in 1992 (1) G.L.R. 503. Reliance was placed on the observation made by the Division Bench in the said judgment wherein, the Division Bench observed that if the new figures of cencus are not available and until fresh cencus figures are ascertained then the election to the Municipal Corporations would have to be held as per the old cencus figures. It was observed that, all that would happen is that number of councillers to be fixed ward-wise, may remain at a reduced figure as compared to the higher figures of councilers worked out as per additional population that may have grown after the last cencus. It was further observed that new voters would naturally exercise their right of frenchise as electoral rolls would have to be made upto date as per the rules and number of councilers if at all get increased as and when latest figures are available and until such time number of councilers as ascertained on the basis of earlier cencus would remain in operation. The Division Bench observed that, this has nothing to do with the effective exercise of franchise by voters on the one hand and for

formulation of local self government in its true spirit on the other.

On the basis of above observations, learned Counsel submitted that, it was always open for the Commission to initiate the election process without waiting for the State Government to issue the notification in exercise of powers under Section 5 of the the B.P.M.C. Act.

Reliance was placed on the Division Bench judgment of this Court in case of Rasikchandra D. Acharya Vs. State reported in 36 (1) G.L.R. 36. In the said decision the Division Bench was considering the situation where the State Government had failed to conduct the elections for various Municipal Corporations and other local bodies for a considerable period of time and after series of litigations, the Act was passed by the State Legislature called Gujarat Local Authorities, (Temporary Postponement of Election) Act, 1994 whereby the elections which were due for the Panchayats, Municipalities, and Corporation were sought to be postponed till after 4th of January,1995. The Division Bench was considering the Constitutional validity of the said Act. Counsel for the petitioner drew my attention to the following observations made by the Division Bench in Para Nos.25,26 and 27 of the said judgment which reads as follows.

“25. Being conscious of the fact it cannot expressly disobey the Constitutional provisions, the Legislature, in the present case, has employed an indirect method of achieving exactly the same result. Whereas the provisions of Parts IX and IX-A were incorporated in the Constitution so as to put Local Authorities on a firmer footing and to ensure regular and timely conduct of

elections and also to provide for representation to the weaker sections of society, the impugned Act seeks to nullify, at present partially, the same. Art.243-B and Art.243-Q clearly state that there shall be constituted Panchayats and Municipalities. This is clearly a mandate of the Seventy-third and Seventy-fourth Amendments of the Constitution. But, instead of constituting the said local bodies by holding elections in the manner contemplated by the said Part, what the impugned Act does is just the opposite. The very basis or the direction to constitute the local body is sought to be frustrated by postponing the elections.

26. It was represented that this is only a temporary measure. It is not unknown that such temporary measures have a nasty habit of becoming permanent. The track record of the Government has been such that whenever there has been a requirement to hold elections to the local bodies in the last about 5 years, then for one reason or another, whether by administrative act or by passing a law, the elections have been postponed. Only a year earlier a similar law, being Act 1 of 1993, for postponing such elections had been passed. The impugned Act is the second similar attempt being made, within one year, to postpone the elections once again. Postponing the elections, when due, has the effect of preventing the elections being held at the proper time. Art.243-B and Art.243-Q state that local bodies should be constituted, but the impugned Act has the effect of preventing the early constitution of the same.

27. Even if the said Part IX and Part IX-A of the Constitution do not contain a time limit within

which the elections are to be held for constituting the local bodies under the said provisions, as has been contended by the learned Counsel for the respondents, even then a statute expressly enacted to prevent the holding of elections is clearly contrary to the mandate contained in Article 243-B and Art.243-Q. If the State Legislature has the power to postpone the holding of the elections by a few months, as has been contended by the Counsel for the respondents, then it must follow that it would have power to postpone the elections for a few years as well or that such power can be exercised repeatedly,as is in the fact done. Surely, the provisions of Part IX and Part IX-A of the Constitution cannot be frustrated by resorting to the subterfuge of postponing the elections."

The bench finding that the provisions made in Article 243 U are mandatory held that the elections are required to be regularly held. In paragraph No.44, the Bench made following observations.

"44. It will be seen that the provisions of Part IX and Part IX-A do not contemplate any hiatus. The elections are required to be regularly held and the only time that an unelected body can exist is when it is superseded. Even then it is incumbent to hold the elections within six months of the supersessions. Whereas under Art.83 and Art.172 the duration of the Parliament and the State Legislatures can be extended due to the Proclamation of Emergency, in the case of Local Authorities no such contingency is contemplated by Part IX or Part IX-A of the Constitution and election schedule has to adhere to the provisions of Art.243-E and Art.243-

U of the Constitution. Therefore, any attempt on the part of the Executive or the State Legislature not to hold elections cannot be permitted. The inescapable conclusion, therefore, is that Sec.3 of the impugned Act is ultra vires."

The Bench also observed that merely because the State Government has delayed the preparation of the rules, should not be a ground for the State Election Commission to postpone the revision of rolls. The bench noted the submissions on behalf of the State Election Commission that the election could be held at once if the main Act is held ultra vires. Consequently, the suggestions of the Counsel for the State Election Commission to the effect that work of delimitation of the Municipalities can be done within 15 days and electoral rolls can be prepared within six weeks thereafter and elections can be held within 35 days of the preparation of the rolls was accepted by the Court.

On the basis of the strength of the said decision of this High Court in the case of Rasikchandra D. Acharya Vs. State (supra), learned Counsel Shri Oza submitted that the Commission has a bounden duty to hold the elections before the term of the Corporation is over. He contended that provisions of Article 243U(1) of the Constitution are mandatory in nature as held by the Division Bench in the said decision of Rasikchandra D. Acharya (supra) and the Commission cannot make any deviation from the Constitutional mandate. He also points out that time frame suggested by the Commission should not be accepted since it is possible to conduct the election in much shorter time and there would be no

conflict with the statutory provisions providing for a minimum time frame required for completion of different stages of the election.

Reliance was placed in the decision of Chandra Mohan Vs. State of U.P. reported in A.I.R. 1966 SC 1987 to contend that the Court should adopt harmonious working of the Constitution and avoid an interpretation which will lead to absurdity or which would give rise to inconvenience. He contended that, harmonious construction of the provisions of Article 243 U(1) of the Constitution and Section 6 of the B.P.M.C. Act, would require that the Election Commission must hold the elections before the term of the Corporation is over.

Reliance was placed in the decision of State of Bihar And Another Vs. Bal Mukund Shah And Another reported in (2000)4 SCC 640 to contend that no rule or law made by the deligator can supersede or overright the powers exercise or the law made by the deligator of power. It is contended that provisions of B.P.M.C. Act cannot be utilized to overrule the directives of the Constitution particularly, one contained in Article 243 U (1) which mandates that the elections shall be held before the term of the Corporation is over.

Reliance was placed on the decision reported in (1994) 5 SCC 28 in the case of Kerala S.M.T.Federation And Others Vs. Kerala Trawlnetboat Operators' Association And Others for the same purpose.

Reliance was placed on the decision of Preeti Srivastava Vs. Stae of Madhya Pradesh reported in A.I.R.

1999 SC 2894 wherein, the Supreme Court observed that State cannot prescribe criteria which adversely affects standard of higher education where such powers have been exercised by the Medical Counsel since the subject in question falls under entry no.66 of list I of the Constitution.

Learned Counsel Shri Oza also placed reliance on the decision of the Hon'ble Supreme Court in the matter of Special Reference No.1 of 2002 reported in 2002 8 SCC 237. He placed reliance on the observations made by the Hon'ble Court in para No.76 of the said decision, wherein, it is observed that Article 324 was enacted and the superintendence, direction, control and conduct of election was no more left in the hands of executive but was entrusted to a autonomous constitutional authority viz. the Election Commission. Reliance was placed on the observations made in Para No.105 of the said judgment wherein, it was observed that the Election Commission is vested with the power to decide the election schedule. It can act only in accordance with the Constitutional provisions.

10. Appearing for the State learned A.G.P. Shri P.R.Abichandani submitted that the State Government had taken all necessary steps to ensure that the elections are held as early as possible. He pointed out that the State Government had called all Municipal Corporations to send proposal for number of wards and for reservation of seats in favour of different categories as early in June, 2004. He pointed out that in January and February, 2005, the State Government had written series of letters to the Delimitation Commission

requesting for lifting of the ban on delimitation of wards. He submitted that upon receipt of such permission from the Delimitation Commission, further steps were taken for issuance of the notification in exercise of powers under Section 5 of the B.P.M.C. Act. He submits that the time taken by the State Government cannot be termed as unreasonable or excessive. He submitted that allegation of political malafides are not established since there is no material on record to substantiate this allegation. He pointed out that, the State Government has taken all necessary steps for initiation of the election process at the earliest. He pointed out that in the letters written by the State Government to the Delimitation Commission, the question of time limit for holding of the election was highlighted. Conscious of the necessity of holding the elections before the completion of the term of the existing Corporation, the State Government had taken all steps within its powers to ensure that the election process commences early enough to enable the Commission to conduct the elections before 15th of October, 2005.

11. Appearing for the Commission learned Senior Counsel Shri S.N.Shelat submitted that issuance of the notification by the State Government under Section 5 of the B.P.M.C. Act, is the starting point for the Commission to undertake the process of election and unless and until the notification is issued by the State Government it is not possible for the State Election Commission to initiate the process of delimitation of wards leading to specifications of reservation of seats in favour of different reserved categories and in favour of women candidates leading to

the preparation of electoral rolls and culminating into the completion of the election through frenchise and counting of votes passing through different phases of conduct of election. It was contended that the conduct of the election is fully within the domain of the Commission and it is the Commission alone which can set the time-table for conduct of the elections. It is further contended that immediately upon receipt of the notification from the State Government dated 8th June, 2005, the Commission took steps by issuing a circular on 9/6/2005 requiring the Collectors and Designated Officers to furnish details and proposals for delimitation of wards. The Commission also convened a meeting with the Collectors and the Election Officers on 21st of June, 2005. It was further contended that the Commission has taken prompt action upon receipt of the notification from the State Government. It is contended that entire process has to pass through several complicated stages which would require sufficient time for its completion and the estimate of the State Election Commission cannot be termed as unreasonable calling for interference from this Court. It was pointed out that under the Provisions of the Delimitation of Wards Rules 1994, the Commission has to constitute wards in such a manner that the population in all wards is as far as possible practicable equal and to ensure that the population of a ward does not vary by more than 10% from the average ward population of the city. Besides the creation of wards the Commission under the said rules also has to allocate the seats reserved for different reserved categories. Reservation has also to be provided in favour of women candidates on general seats, as well as, within the

reserved seats. It was pointed out that the Commission before finalizing the proposed delimitation of wards and allocation of seats for reserved categories and women has to notify suggestions from the general public and also to consult political parties recognized for the purpose of Representation of People Act, 1951. It was further pointed out that voters list has to be prepared following the provisions contained in Registration of Voters Rules, 1994. Revision of voters list would require sufficient time; since draft voters list has to displayed for a period of 15 days and the same has to be finalized with or without modifications after considering objections and only thereafter the final list of voters can be published. It is contended that after publication of the final list of voters several stages have to be completed before the elections can be concluded by the Commission. It is therefore, contended that the time of over six months as suggested by the Commission cannot be termed as excessive and this Court would not substitute its judgment or opinion for that of the State Election Commission which is Constitutionally created for conduct of elections.

Reliance was placed on the decision of Bhimsinh, President Jammu and Kashmir Panthar Party Vs. Election Commissioner of India & Anr., reported in 1996 (5) JT 569 wherein, the Hon'ble Supreme Court has observed that, it is clearly impossible and undesirable that any outer limit should be placed for the date of polling. The fixation of date of the polling would depend upon a variety of circumstances, all of which have to be taken

into account by the Election Commission acting in consultation with the Government of India, which would have the necessary material in this behalf.

Learned Counsel Shri Shelat also pointed out the observations made by the Hon'ble Supreme Court in the case of Special Reference No.1/2002 (supra) wherein in para no.81 the Hon'ble Supreme Court observed that fixing schedule for elections either for the house of people or legislative assembly is in the exclusive domain of the Election Commission.

12. In so far as the Constitutional mandate to conduct the election of a Corporation before the term of the existing elected body is over, there is hardly any doubt or debate possible. Article 243 U (1) of the Constitution clearly provides that a Municipality unless sooner desolved shall continue for five years from the date of appointment for its first meeting and no longer. Clause (3) of Article 243U further provides that the election to constitute a municipality shall be completed before the expiry of its duration specified in Clause (1). Thus, there is a clear mandate under Article 243 U which would require the Election Commission to complete the election before expiry of the term of the municipality.

The Division Bench of this Court in the case Rasikchandra D. Acharya (supra) also found that the provisions contend in Article 243 U are mandatory in nature. Section 6 of B.P.M.C. Act also has been amended by Gujarat Act 16 of 1993 to bring the same in tune with the Constitutional amendment by virtue of which Article 243U was inserted in the Constitution. Section 6 of the

B.P.M.C. Act also provides that every Corporation unless sooner desolved shall continue for five years from the date appointed in its first meeting and no longer.

Section 6B of the B.P.M.C. Act provides that the election to constitute a corporation shall be completed before the expiration of its duration specified in sub-section (1) of Section 6. Thus, there is little scope for debate that it is mandatory for the Commission to conduct and complete the election of the Corporation before the term of its outgoing elected body is over and this, aspect of the matter has not been seriously doubted or debated on behalf of the respondents.

It thus clearly emerges that to install a democratically elected body of councilers to look after the affairs of the Corporation before the term of the previous Corporation comes to an end is the mandate of law.

13. The question however is whether either the State Government or the Commission willfully sought to delay the election as suggested by the petitioner and whether the Election Commission could have initiated the election process without the issuance of the notifications by the State Government under Section 5 of the B.P.M.C. Act ? Subsidiary question would be whether the time frame suggested by the Commission can be termed as so unreasonable as to call for interference from this Court.

In so far as these questions are concerned, as noted earlier, the State Government has submitted a detailed chart showing the different stages through which the

process before the State Government passed before the notification under Section 5 of the B.P.M.C. Act, came to be issued. I have also perused original files of the Government containing the documents in this regard. As noted earlier, there was a ban from the Delimitation Commission against alteration of boundaries of administrative units of circles and wards. The State Government after collection of proposals from different corporations renewed its efforts with the Delimitation Commission to relax the ban and grant permission to the Government to issue the necessary notification. On 17/6/2004, six municipal corporations situated in the State of Gujarat were requested to send proposal for number of wards and for specifications of reservations of seats as per the final figures of 2001 cencus. Last of these proposals were received from the Ahmedabad Municipal Corporation on 4/12/2004. Upon receipt of this proposal the State Government wrote series of letters between 3rd January, 2005 to 23rd February,2005 to the Delimitation Commission. Upon receipt of the permission from the Delimitation Commission vide its letter dated 24/3/2005, which was received by the State Government on 28/3/2005, a proposal was submitted for approval for determining number of wards, etc.. on 15/4/2005. The proposal was scrutinized at various levels and approved on 6th June, 2005. On the same day, draft notification was sent to the concerned department for vetting. The Draft Notification was approved on 7th of June, 2005 and actually issued on 8th of June, 2005. From the sequence of events it is appearant that the State Government renewed its efforts with the Delimitation Commission after getting proposal from different Municipal Corporations. Only one jarring note I find is that the Ahmedabad

Municipal Corporation was permitted to consume more than six months for sending its proposals which did not require such efforts that it should have consumed such a long time. After receipt of the permission from the Delimitation Commission one may notice from the events chronologically noted herein above that real urgency was shown by the State Government from 6th of June, 2005 onwards. This has co-incided with the receipt of notice from this Court in the present proceedings. It may be noted that this Court issued notice on 23rd of May, 2005 making it returnable on 7th of June, 2005. The notice was served on the State Government on or around 27th May, 2005. Soon thereafter, the machinery moved with greater urgency culminating into issuance of notification under Section 5 of the B.P.M.C. Act. Despite these factors I am unable to see any political malafides or any design on part of the State Government to intentionally delay the election of the Municipal Corporations. The petitioner has not laid down any firm foundation to establish malafides on the part of the respondents. I have taken some pains to examine the actions of the State Government and the different stages through which the process was undertaken which ultimately resulted into issuance of the notification dated 8th June, 2005. Though, it is true that some time was consumed at some stages as noted herein above and perhaps some greater urgency would have ensured issuance of notification somewhat earlier, I find that State Government had taken sufficient effort to ensure that the notification is issued expeditiously.

Learned Counsel for the petitioner however submitted that the Election Commission should not have waited for

the State Government to issue the notification and could have and should have initiated the election process on the basis of number of wards as they stood earlier. It is in this regard contended that the Election Commission should even now ignore the notification issued by the State Government and proceed to hold the election on the basis of earlier number of wards to save time and to ensure that the elections are concluded within the time frame.

14. In so far as the question whether the Election Commission should have initiated the process of election without waiting for the State Government to issue the notification under Section 5 of the B.P.M.C. Act, is concerned, I am of the opinion that the question has become one of academic interest. The State Government has as a matter of fact issued such a notification. It is therefore, not correct on my part to decide the question as to what would be the situation if the State Government had refused to issue such a notification. In such a situation would the Election Commission be justified in initiating the process of election without awaiting such a notification relying solely on the number of wards already specified for the purpose of previous election or would the learned Counsel Shri Shelat be justified in contending that the Election Commission cannot initiate the process of election unless and until the State Government issued the notification as required under Section 5 of the B.P.M.C. Act. This question of great interest and which is not possible of an easy answer need not be grappled in the present petition since the issue has become one of purely academic interest. The State Government has as a matter of fact issued the

notification on 8th of June, 2005. It is therefore, not possible for this Court to accept the contention on behalf of the petitioner that even after issuance of such a notification, the Commission should ignore the notification and proceed ahead in conducting the election on the basis of the old cencus and only on the situation as prevailing prior to the issuance of the notification.

Reliance placed by the learned Counsel for the petitioner on the decision of this Court in the case of A.A.Kureshi Vs. State Government (supra) in this regard is not well founded. Firstly, the said decision was rendered in background of the provisions which stood in the statute prior to introduction of 73rd Amendment in the Constitution and the consequent amendments in the B.P.M.C. Act. Secondly, the facts and situation in the present case are also vastly different. The State Government has issued a notification as required under Section 5 of the B.P.M.C. Act. Upon issuance of such a notification, the Commission is required to undertake the task of delimitation of wards and specifications of reservations of seats in favour of different reserved categories and women candidates, as well as, for reservation of seats for women within the reserved categories. This has to be followed by preparation of revised voters list which would then lead to issuance of notification for conducting the election. Under the scheme of the provisions under the B.P.M.C. Act and the Rules made there under, it is impossible to divest and disassociate the notification issued by the State Government on 8th of June, 2005 and direct the Commission to hold the election ignoring such a notification. It was stressed on behalf of the petitioner that in the

decision in the case of Rasikchandra D. Acharya (supra), the Division Bench observed that the Provisions of Part IX and Part IX A of the Constitution do not contemplates any hiatus and that elections are required to be regularly held and the only time that an unelected body can exist is when it is superseded. It is well settled that observations made by a Bench in a decision cannot be viewed in isolation and the entire judgment has to be read as a whole to cull out the ratio laid down therein. One may appreciate that the Division Bench in the case of Rasikchandra D. Acharya was considering Constitutional validity of Gujarat Local Authorities (Temporary Postponement of Election) Act, 1994 which was enacted to prevent the holding of elections to local authorities though due. It was the case where the Bench was considering the said legislation which had proposed to postpone the elections to various local authorities which were long time overdue and which were ordered to be concluded early; by an another Division Bench judgment. Observations made in this regard therefore, cannot be termed as ratio having been laid down by the Division Bench to the effect that, under no circumstances, whether it is possible to hold the election or not for any reason at all, such election cannot be delayed beyond the term of the existing corporation since, it would create a vaccume which is not envisaged under the scheme of the B.P.M.C. Act or under Part IX and IX A of the Constitution.

15. The conclusion of the above discussion brings me to the last aspect of the matter viz. whether the time frame suggested by the commission is so unreasonable as to call for interference from this Court. As noted

earlier, under the provisions of Article 243Z of the Constitution, the superintendence, directions and control of the preparation of the electoral rolls and in the conduct of all elections to the Municipalities vest in the State Election Commission. In the decision of Special Reference No.1/2002 reported in 2002 8 SCC 237 also the Hon'ble Supreme Court observed that fixing schedule for elections either for the house of the people or legislative assembly is in the exclusive domain of the Election Commission. These remarks were of course made in context of the elections to the House of People or legislative assembly of a State and the reference was to the Election Commission; in so far as the powers and duties of the State Election Commission to hold the elections of the Municipalities is concerned, the situation would be similar. Infact, it has not been seriously doubted that the Commission has primary duty to hold the elections of the Municipal Corporation. The Commission therefore, has to set its own time-table and fix the dates for different stages through which the conduct of election has to pass. As noted earlier, after issuance of the notification by the Government, under Section 5 of the B.P.M.C. Act, the Commission has to constitute the wards in a manner provided in the Delimitation of Wards Rules, 1994. The Commission has to allocate the seats for different reserved categories and also for women candidate. Before finalizing the proposed delimitation of wards and allocations of seats reserved for schedule caste, schedule tribe, backward class and women, the Commission has to invite suggestions from the general public and also consult political parties recognized for the purpose of Representation of the People's Act.

The Commission also has to undertake the task of preparation of the list of voters by following the procedure laid down in the Registration of Voters Rules, 1994. The Commission thereafter has to hold the elections after declaration of programme of election giving sufficient time to the candidates for filing nominations, verifications of nominations and thereafter, for withdrawal of nominations to be followed by actual voting. The time frame suggested by the Commission therefore, cannot be termed as such, which is so unreasonable and excessive as to call for an intervention by this Court in exercise of powers under Article 226 of the Constitution of India. The Commission is primarily entrusted with the duty of holding the election in the Corporation and it is vested with the full power and authority for deciding its own time frame; unless the time proposed by the Commission is highly unreasonable, it would not be possible for this Court to substitute its own estimate for that of the Commission and suggest a shorter time limit. The time frame suggested by the Commission is therefore, accepted.

16. The fact however remains that despite both the State Government, as well as, the Commission being acutely conscious of the Constitutional mandate to hold the elections before the term of the Corporation expires, for some reason or the other, it is now appearant that the elections will not be over before the impeding deadline of 15th of October, 2005. The situation is all the more piquant since the cencus figure of 2001 were admittedly available with the State Government as far back in December, 2003. From the correspondence made by the State Government with the Delimitation Commission,

files of which were shown to the Court, it is clear that the State Government was also conscious of the requirement of conducting of the election before 15th of October, 2005. The Commission has also in theory not disputed the contentions of the petitioner that the Constitutional mandate requires that the election should be conducted and completed before the term of the corporation expires. I have already noted the view of the Division Bench of this Court in the case of Rasikchandra D. Acharya Vs. State Government (supra) wherein, the Division bench of this court felt strongly about the delays being committed by the Government and in that case with the connivance of the opposition party in conduct of elections in various democratic institutions. The State Government, as well as, the Commission are bound by the Constitutional mandate and the ratio of the decision of the Division Bench of this Court in the case of Rasikchandra D. Acharya (Supra) and any further delay in conduct of the election would be most unfortunate, undesirable and impermissible.

In the decision of Presidential Reference No.1/2002 reported in 2002 8 SCC 237, the Hon'ble Supreme Court made certain observations which need to be noted at this stage. Though, these observations were made in context of the elections to the house of people and legislative assembly of the States, they would have relevance in the context of the present case also. In para No.150 it was observed that the necessity for completing the election expeditiously is enjoined by the Constitution in public and state interest to see that governance of the country is not paralised. In para No.152, it was further observed that, situation may be created by interested persons, to

see that elections do not take place and the care taker continuous in office. This certainly would be against the scheme of the constitution and the basic structure to that extent shall be corroded. It was further observed that a responsible government provides for a healthy functioning. The democracy has to be contrasted with the care taker government which is ad-hoc in all its context and which is not required to take any policy decision. In para No.153, it was further observed that free and fair election is a sina-qua-non for democracy. The Election Commission is a high constitutional authority charged with the duty of ensuring free and fair elections and the purity of electoral process.

Considering the constitutional mandate, the Provisions of B.P.M.C. Act and the above noted judicial pronouncement, no further delay in conduct of the election can be brooked and the Commission must adhere strictly to the time frame suggested by the Commission itself. No further variation or relaxation should be expected.

17. To sum up I have come to the following conclusions.

i. To complete the elections before the completion of the term of the Corporation is a Constitutional mandate which is not even doubted or debated by the State Government or the Election Commission. This is also borne out from the Division Bench decision of this Court in the case of Rasikchandra D. Acharya Vs. State Government (supra).

ii. It is primarily the duty of the Commission to conduct free and fair election within time and the State Government must aid the Commission in all respects to ensure that the election process is completed within time.

iii. In a case where the State Government fails to issue notification under Section 5 of the B.P.M.C. Act, whether the Commission can hold the elections without waiting for such a notification is a question which in the present context has become one of academic interest and not necessary to be decided in the present petition.

iv. As noted earlier though, there are some gaps in the steps taken by the State Government leading to the issuance of the notification under Section 5 of the B.P.M.C. Act, I am unable to see any political malafides or a larger design to install an administrator as suggested by the petitioner.

v. The time frame suggested by the Commission for conduct and conclusion of the election is reasonable and is accepted.

vi. This time frame however must be strictly followed and the elections must be completed latest by 31st of December, 2005 and no further extension for holding the election would be permissible without the permission of the State Government.

18.With these observations and directions, the petition is disposed of.

(Akil Kureshi, J.)

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